IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 127

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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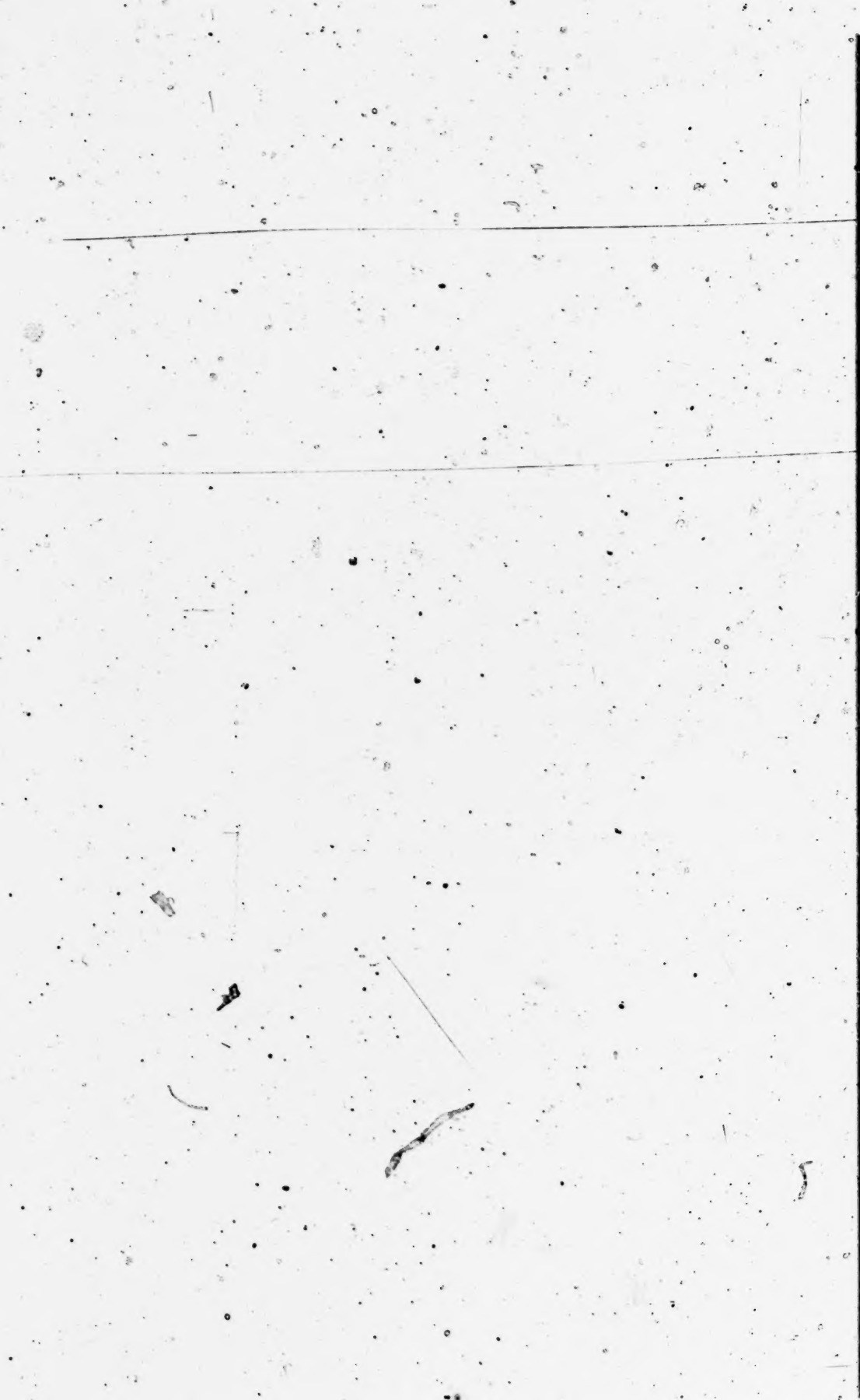

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Citations to Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit, dated February 12, 1957, is reported at 241 F. 2d 147. The Decision and Order of the National Labor Relations Board enforced thereby is reported at 113 N.L.R.B. No. 123.

Jurisdiction.

The petition for a writ of certiorari was granted on October 14, 1957.[1] The jurisdiction of the Court is based upon 28 U. S. C. 1254(1) and Section 10(e) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*

Questions Presented.

1. Whether substantial evidence supports the Board's conclusion that the unions' conduct was not primary activity outside the scope of Section 8(b)(4)(A).

2. Whether substantial evidence supports the Board's conclusion that the unions, through the activities of foreman Steinert, "induced and encouraged" employee refusals to work within the meaning of Section 8(b)(4)(A).

3. If the answers to the first two questions are in the affirmative, whether the Board and court below properly concluded that Section 8(b)(4)(A) is violated by the enforcement, through union instructions to member workmen, of a clause in a collective bargaining agreement stating that "workmen shall not be required to handle non-union material," notwithstanding the employer's acquiescence in such refusals to handle such materials.

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[1] This Court's order allowing certiorari provides that this case be consolidated with No. 273 (*National Labor Relations Board v. General Drivers, etc., No. 886*) and No. 324 (*Local 850, Intl. Assn. of Machinists v. National Labor Relations Board*) for argument. The Board and Court citations below of these cases are 115 N.L.R.B. 800 and 247 F. 2d 71 (C.A.D.C.).

Statute Involved.

The statutory provisions principally involved are Sections 7 and 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 141, *et seq.*). These sections read as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

"SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

The other relevant provisions of the Act are reprinted in the Appendix.

Statement.

A. The Labor Dispute.

This case arises from a labor dispute in August, 1954 involving the petitioning unions, Local 1976 and Los Angeles District Council of Carpenters (hereinafter jointly referred to as Carpenters Union), and Havstad and Jensen, building contractors, of Los Angeles, California. The following résumé of the facts of the dispute is based upon the findings of the Trial Examiner which were adopted without substantial alteration by the Board and the court below, together with uncontradicted evidence in the record. Except for certain conclusionary fact findings by the Board which will be hereinafter noted, petitioners do not challenge the findings here.

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Association, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties covenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

At least one of the contractors, Jensen, had maintained contractual relations with the Carpenters Union, through the Building Contractors Association, since 1933 or 1934. [R. 194-197.]

In August, 1954 Haystad and Jensen, as joint venturers, were engaged in the construction of a hospital and other buildings on the campus of the College of Medical Evangelists, a medical school and nurses' training school owned and operated by the Seventh Day Adventists in Los Angeles.

Doors for the hospital, which was known as the White Memorial Hospital, were manufactured by Paine in Oshkosh, Wisconsin, and were purchased by Sand Door and Plywood Company, a wholesale jobber and exclusive agent for Paine in Southern California. Sand sold the doors to Watson & Dreps, mill work contractors, with delivery between August 14, 1954, and August 17, 1954. A few days before August 17 some of the doors were delivered to the jobsite of Haystad and Jensen. [R. 209.] The doors had not been manufactured by union labor since Paine "had no union connection" of any kind. [R. 19.]

Arnold Steinert, Haystad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Haystad and Jensen [R. 105-106], on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees, and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery

of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building; preparatory to their being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M. Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees. [R. 131-132.] Shortly before 11:00 A.M., of that day, Nathan Fleisher, business agent of Respondent Carpenters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert [R. 167-168], but was present when Steinert spoke to Agronovich.

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence,

learned what had happened, and went to the job site looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargaining agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180, 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.]

Havstad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153; 97.]

Steinert was a member of a constituent local of Petitioner, Los Angeles County District Council of Carpenters. The latter's By-Laws and Trade Rules provide:

> "All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.
>
> "No member shall use, handle, install or erect any material produced or manufacturer from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America." [R. 198-201, 53.]

B. Proceedings and Decision of the Board.

On August 25, 1954, Sand filed charges against petitioners, alleging that the foregoing conduct was in violation of Section 8(b)(4)(A) of the Act. After issuance of complaint and the usual hearings, the Trial Examiner

of the Board filed his Intermediate Report and Recommended order on December 13, 1954. After making findings substantially as stated above, he recommended dismissal of the complaint. [R. 207-208.] He concluded that petitioners had "induced and encouraged" employees of Havstad & Jensen to refuse to hang the Paine doors (1) because of the conduct of Fleisher, (2) because of the trade rules and by-laws of the District Council and (3) because "of the reservation in the collective bargaining contract of a right to refuse to work on non-union material." [R. 24.] He further found Havstad & Jensen to be the primary employers and Paine and Sand to be the secondary employers involved. [R. 21-22.] The object of the unions' conduct was found to be the forcing or requiring of Sand Door to cease doing business with Paine. [R. 27.] His recommendation of dismissal was premised upon *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 N.L.R.B. 740, which he deemed "the latest expression of the Board on the point." He construed this case as holding that employee refusals to handle materials were not refusals "in the course of employment" within the meaning of the secondary boycott section where the collective bargaining agreement contains provisions authorizing or directing employees to refrain from work on those materials. [R. 24-25, 27.]

Although a divided Board substantially adopted the Trial Examiner's findings of fact [R. 49], it rejected his conclusions and recommendations and found a secondary boycott violation. Havstad & Jensen were found to be secondary or neutral employers. [R. 51.] The entire rationale of the Trial Examiner upon which he had based his finding of union "inducement and encouragement" of employee action was discarded. In its place

a majority of the Board substituted the following chain of reasoning: (1) Fleisher, an admitted union agent, "approached Steinert in Steinert's capacity as agent of the Respondent's District Council," rather than in his capacity as a foreman and representative of Havstad & Jensen; (2) Steinert acted as an agent of the unions in ordering the laborers and carpenter Agronovich to stop handling doors, rather than in his capacity as their foreman; (3) Steinert's conduct is attributable to the Local Union because the District Council By-Laws and Trade Rules make foremen jointly responsible with stewards for the enforcement of such rules on the job; (4) one of the Council's Trade Rules forbids members to work on non-union materials and it was this trade rule, rather than the similar collective bargaining provision, which Steinert sought to enforce. [R. 52-55.]

On the authority of *Washington-Oregon Shingle Weavers' District Council (Sound Shingle Co.)*, 101 N.L.R.B. 1159, enforced 211 F. 2d 946 (C. A. 9, 1954), the Board rejected the unions' contention that its activities were in support of a primary labor dispute with Havstad & Jensen. [R. 55.] Like the Trial Examiner, the Board majority concluded that an object of the unions' actions was to force or require Sand to cease doing business with Paine and found the further objective of forcing or requiring Havstad & Jensen to cease doing business with Sand. [R. 55-56.]

Upon the crucial question of the effect of the provision of the collective bargaining agreement that workmen should not be required to work on non-union ma-

terials, three members of the Board agreed, for different reasons, that it afforded no justification for union-induced employee refusals to work on such materials. Members Peterson and Murdock dissented on this point as well as the other holdings set forth above. Former Chairman Farmer and present Chairman Leedom, whose holding became the Board's decision, reasoned that there was nothing unlawful in the "non-union materials" clause nor in union appeals directly to the employer to honor it. But any direct appeal to employees to assert their privilege not to handle non-union materials in accordance with the clause, otherwise within the secondary boycott prohibition, would be a violation, notwithstanding the employer's acquiescence in the union's demands. Member Rodgers in a concurring opinion adhered to the position taken by him in the *McAllister Transfer* case, 110 N.L.R.B. 1769, that all types of "hot cargo" clauses are illegal *per se* and for this reason no defense to a secondary boycott charge.

The effective majority opinion was succinctly stated in the following words:

> "Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy. However, we do not agree that unions, which are parties to such contracts, may *approach* employees of the contracting employer and induce and encourage them to refuse to handle the goods of another employer with immunity from the sanctions of Section 8(b)(4)(A). . . . The employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted." [R. 59, 60.]

C. The Decision of the Court Below.

The court below enforced the Board Order adopting in substance the reasoning of the Board majority. [R. 207-226.] On the authority of its own decision in *National Labor Relations Board v. Washington-Oregon Shingle Weavers District Council, supra*, it rejected the unions' contention that enforcement of the "non-union materials" clause involved primary rather than a secondary union activity. Further reliance was placed upon the Board Decision in the *General Driver (American Iron and Machine Works Company)* case, 115 N.L.R.B. 800, which was decided after the Board decision in the instant case and whose holding is largely premised on the instant case. (As stated in footnote 1, *supra*, The *American Iron and Machine* cases are calendared for argument with this case.) With respect to the unions' claim of lack of evidence to support the finding of employee inducement, the court reasoned that "it is logical to assume that he (union agent Fleisher) was invoking (foreman) Steinert's obligations under the union's rules." A provision of the collective bargaining agreement waiving union rules "with reference to the relations between the contractors and their employees" was ruled inapplicable to union foreman Steinert.

Summary of Argument.

I.

Section 7 of the Act guarantees to employees, acting in concert with each other or through their unions, the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In every case in which the exercise of these rights takes the form of striking, refusing to perform work tasks or otherwise exerting economic pressure upon an employer there is an inevitable involvement, to some degree, of other employers and the public at large. This results from the very nature of a production and distribution system based upon an open competitive market and a price system left largely to the play of forces of supply and demand for both goods and labor. By Section 8(b)(4)(A) as well as other sections of the Act Congress sought to limit to some degree, but not to eliminate, the impact of Section 7 activities upon the habits, practices, interests and desires of the public generally—including other employers, employees, and citizens generally. Whatever the intention of the Congressional majority may have been in setting these limits, the words used in the section were shortly found by the Board and the courts to yield possible, and even plausible meanings, which would foreclose the use of economic pressure by unions and their members for any purpose or objective. In order to prevent this result, so obviously destructive of the entire statutory scheme, the Board, with court approval, construed the section as having no limiting application to union inducement of strike action by employees in support of demands against their own employer having a reasonably direct relationship to their own terms and conditions of employment. Since the statute encourages and, in some

circumstances, compels the execution of collective bargaining agreements as the means of fixing terms and conditions of employment in the interest of labor peace as well as the affirmative promotion of living standards of workers, direct union sponsored economic action by employees against their own employer to compel him to give effect to lawful bargained conditions of work would appear without question to be "primary" activity. The actual or threatened economic *effect* of such conduct upon other employers or the public generally cannot be the measure of legality under the section so long as the objective or purpose of the union is related to the enforcement of lawful contract provisions and is not a subterfuge for the imposition of economic sanctions upon other employers.

In the instant case, the Board majority specifically found that the "non-union material" provisions in the collective agreement were not themselves in contravention of the statute or its policies. Having so found, the only rationale which will support the Board's conclusion that the unions' use of traditional primary means to effect enforcement of the clause is in reality a proscribed "secondary" boycott is the substitution of the word "effect" for "object" in the section. Aside from the legislative character of such a substitution, the Board would have largely destroyed the distinction between "primary" and "secondary" activities which alone allows the section to be read in harmony with the broad protections of Section 7.

II.

Independently of all other issues in the case, the Board's finding of unfair labor practices fails unless there is preponderant evidentiary support in the record for its

finding that the unions induced or encouraged employees to refuse to handle the non-union doors. This finding is based solely upon the instructions given by company foreman Steinert to some laborers and one carpenter. As will be shown by an examination of the undisputed evidence, the conclusion is based not upon evidence but upon presumption and conjecture.

III.

The Act does not, either expressly or through its underlying policy, make unenforceable the "non-union materials" clauses through union advice to its members to assert their rights thereunder. As found by the Board and the courts such provisions are themselves lawful. It follows that enforcement through union induced action of the beneficiaries of the clause cannot be unlawful because such a holding would in practice outlaw the clause itself. The language of the secondary boycott section does not reach the unions' conduct here because (1) the contract removed work on non-union materials from the course of the carpenters' employment, (2) the company's acquiescence in the refusals to work both by contract and by actions at the time the non-union materials appeared at the job site, shows that there was no strike, inducement to strike or concerted insubordination as required by the section, (3) in view of the provisions of the clause and the company's acquiescence in its enforcement the company was not "forced or required" to do anything within the meaning of these words as they appear in the section, and (4) as shown in Point I above the illegal object required by the section is not present when the union is enforcing only the primary obligation contained in its contract with the employer.

ARGUMENT.

By agreement with counsel for the respondent General Drivers in No. 273 (*National Labor Relations Board v. General Drivers, etc., No. 886*) and for the purpose of avoiding duplication, the principal arguments in favor of the validity and enforceability of "hot cargo" type agreements will be set forth in respondent's brief in No. 273 which is herewith adopted, to the extent applicable, as a statement of the position of these petitioners. The following arguments are an application of the controlling legal principles to the factual situation presented in this case, as distinguished from No. 273.

I.

The Unions' Conduct Was Primary Activity Outside the Scope of the Secondary Boycott Section of the Act.

The Trial Examiner was correct in finding that Havstad and Jensen was the primary employer because he recognized from the evidence that there was a dispute between Respondents and Havstad and Jensen that involved a working condition prescribed by a collective bargaining contract by which Havstad and Jensen had bound themselves not to require their employees to work on non-union materials. [R. 203-204, 193-196, 197.] That, and that alone, was the genesis of this controversy, and no amount of legal sophistry can make anything else of it. It was no more than an accident that Paine doors were the thing that pointed up the breach of the collective bargaining contract on the part of Havstad and Jensen when they sought to require their employees to do what they had previously legally agreed not to require. The process of collective bargaining is always designed to

establish the rules under which employees accept employment and the employer to obtain the benefits of that employment. The requirement, freely accepted by Havstad and Jensen, that their employees were not to be required to work on non-union materials is as much a condition of work as wages, hours or other conditions of employment. Not only did Havstad and Jensen bind itself by this requirement to remove from the working conditions the necessity of employees working on non-union goods, they further agreed, to insure faithful performance of this contractual provision, that they were under no disability of any kind whether arising out of the provisions of Articles of Incorporation, Constitution, By-laws, or otherwise, that would prevent them from fully and completely carrying out and performing each and all of the terms of the agreement, and further, that they would not by contract or by any means whatsoever take any action that would prevent or impede them in the full and complete performance of each and ever term and condition of the collective bargaining agreement. [R. 203-204.]

Thus, when Respondents protested the violation of the bargaining compact, they were in direct dispute with Havstad and Jensen. The involvement of Paine was sheer mishap. Under this record we respectfully submit that the Trial Examiner's conclusion that Havstad and Jensen were the primary employers is cogently sustained by the record and that the Board erred in finding to the contrary.

As shown in the economic brief filed in No. 273, clauses of this type have existed and undoubtedly been enforced by union action at jobsites for many years antedating the passage of the Taft-Hartley Act. This fact itself

argues most strongly that such clauses serve a purpose directly and reasonably related to the terms of employment of the employees covered thereby. This history negates any inference that the clauses were or are an effort by unions to contract themselves out of the proscriptions of Section 8(b)(4)(A). On the contrary this court has indicated that traditional and long established trade union practices and techniques are encompassed within the protection of Section 7 of the Act. The Court said in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346, of the provisions of the Railway Labor Act which are cognate to Section 7 of the National Labor Relations Act:

> "Collective bargaining was not defined by the statute which provided for it, but generally has been considered to absorb and *give statutory approval* to the philosophy of bargaining as worked out in the labor movement in the United States."[6] (Emphasis supplied.)

By its express terms Section 13 of the Act preserves the right to strike and the limitations upon such right as they existed prior to the passage of the 1947 amendments except to the extent that such rights were "specifically" limited by the new sections, including Section 8(b)(4)(A). Section 7 therefore remains the general measure of union rights to engage in collective bargaining and to pursue traditional trade union objectives by traditional trade union means. If broad scope is to be given to any section it is this one, rather than the limiting provisions of the secondary boycott amendment. It is the former and not the latter which continues to express the general policy

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[6] *Cf. H. J. Heinz v. N.L.R.B.*, 311 U. S. 514, 523-526.

of the Act. Section 13 furnishes the two canons of construction applicable to the two sections—broad in the case of Section 7 and narrow in the case of Section 8(b)(4)(A). The rationale of the majority of the Board by which it gives broad sweep to the latter is not permissible under the express terms of the statute. In determining what is primary and what is secondary activity, the same rules of construction ought to apply. Certainly this is true where the conduct being evaluated has for many years been a part of the "philosophy of bargaining as worked out in the labor movement in the United States."

For the foregoing reasons the Board erred in reversing the Trial Examiner's finding and conclusion that the unions' activities were in connection with a primary dispute rather than a secondary one. Concededly, the pursuit of such primary objectives by the means shown is not only lawful but affirmatively protected under Section 7 of the Act.

II.

There Was No Substantial Evidence to Support the Board's Finding That Petitioners Induced and Encouraged Employee Refusals to Handle the Non-union Materials.

The unique approach of the Board majority in concluding that there was a violation of the act, requires an examination of the evidence from which the Board concluded that Arnold Steinert, the foreman for Havstad and Jensen, was an agent of Respondents. The importance of this finding is apparent from the admission of the Board that it is proper for a labor organization to exert pressure against an employer to accomplish a boy-

cott and in the further view that the Board has held that the collective bargaining contract, with its restrictive clause, that "workmen shall not be required to handle non-union material," is not *per se* violative of the act. Consonant with the position of the Board is the conclusion that had Fleisher's appeal to Steinert been an appeal to management no violation would have been found. In order for the Board to make this uniquely strained construction stand up it was necessary for the Board to infer that Steinert was an agent of respondents and not a managerial actor. It is well settled that such an inference must be based upon the preponderant facts and that such a mere inference standing alone is without substance.

The Board relies solely upon the evidence which is found in the by-laws and trade rules of Respondent Council wherein it is stated that "foremen are to be held equally responsible . . . for the enforcement of all by-laws and trade rules of the District Council." The Board says that from this, it is reasonable to conclude that Fleisher was invoking Steinert's obligation under the union's rules and made him the union's agent for their enforcement. But the fallacy of this conclusion is that it is based upon nothing in the record which points to the rule as being the motivating factor which prompted Steinert's conduct. In a similar case and under like conditions, the Seventh Circuit, in *Joliet Contractors Ass'n v. N.L.R.B.*, 202 F. 2d 606, and the Board, in *Glaziers Union Local 27*, 99 N.L.R.B. 1391, both held that by-laws standing alone do not prove a motivating factor sufficient to sustain an agency theory. The Seventh Circuit pointed out that something more than the mere existence of by-law provisions were necessary; that there must be probative evidence that the actor was in fact following

the dictates of such rules. There is, of course, no evidence that the by-laws and rules had anything to do with the action taken by Steinert. The Board seizes this rule as pointing up the culpability of Steinert and totally ignores the provision of the collective bargaining contract which expressly provides, *"that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder."* [R. 204.]

Thus, the provision of the rules are not to reach the end which the Board decides, but it is the provisions of the contract that govern, not the working rules. With this waiver of the rules, established by written contract, Fleisher's appeal to Steinert could only have been based upon the collective bargaining restriction against employees handling non-union materials.

There is no dispute but that Steinert was a foreman in the commonly accepted sense, and that within the meaning of the Act he was a supervisor and not an employee covered by the provisions of the statute. (Sec. 2(3) and 2(11); 106, 123, 131-132, 139-140, 135, 162-164, 166.) Steinert was subordinate to James Nicholson, the general superintendent, and in Nicholson's absence Steinert was in full charge of the job. Steinert's normal functions consisted of laying out work plans for the day, assigning various employees to the work tasks and making periodic checks of the work progress by going to the various locations of employees, observing their work and progress and generally seeing that all employees were

efficiently performing their assigned tasks. This Steinert did on August 17.

When Fleisher came to the building site on this date, the only representative of management present was Steinert. *Nicholson was absent.* There was no other representative of management present for Fleisher to appeal to. In the words of general superintendent Nicholson, Steinert was in complete charge of all operations. [R. 131-132, 137-138, 143.] Fleisher said nothing about the by-laws or trade rules; in fact, there appears that there never was any conversation by anybody about the trade rules. Obviously, Fleisher's appeal was to management.

As further evidence that Steinert was not acting as an agent of Respondents or motivated by the trade rules was the first official action taken by Steinert, and that was to stop the *laborers* from distributing the doors. Admittedly, Fleisher did not represent, nor was he speaking for the laborers. *The laborers are not covered by the trade rules of Respondent Council*, nor are they members of any labor union subject to those rules. [R. 158, 165.] The next official act taken by Steinert was to direct a carpenter to cease handling the doors. This was the same carpenter that Steinert had previously assigned to the task of making the preliminary arrangements to "hang" the doors. Thus we have a startling inconsistency. When Steinert assigned the carpenter to this task, Steinert was acting for management, but when Steinert directed the employee to cease that assignment and begin another one Steinert becomes an agent of Respondents.

It is uncontroverted in this record that Steinert was the authorized agent of Havstad and Jensen, to whom the employees looked to for instructions in the performance of their work and the assignment of their job tasks; it is

abundantly clear that had the employees refused to follow the instruction of Steinert they would have been guilty of insubordination as pointed out in Member Murdock's dissent.

We submit that for the Board to ignore the proven managerial status of Steinert, in view of the undisputed evidence, and to find that he represented Respondents and thus induced a strike of employees he supervised is an unwarranted and unreasonable conclusion, and not supported by the substantial evidence on the record considered as a whole.

This being true, Respondents are not responsible for the acts of Steinert, and under the majority's admitted position, as expressed in its decision, there has been no inducement of employees by Respondent, an indispensable element of a violation of 8(b)(4) of the Act.

III.

Enforcing the Contract Provision Against Handling Non-union Materials by Union Inducement of Employee Refusals to Handle Does Not Violate Section 8(b)(4)(A).

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway

of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision relating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions 'forcing or requiring any employer . . . to cease doing business with any other person.'
>
> "Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

The court below in the *Sound Shingle* case, *supra*, assumed the decision of the Second Circuit to be a proper statement of the law with respect to the hot cargo phase, but did not apply it because the court found there was no agreement in the *Sound Shingle* case which had a provision removing hot cargo from the employment area. However, the court there said that the Board had long recognized that where there were agreements, such as present here, "it would be a waiver of the employer's statutory protection against secondary boycotts," which the court thought was the correct principle of law to be applied. In order to sustain the Board's current change of position, the court has necessarily overruled *Sound Shingle* although continuing to cite it with apparent approval.

Here two members of the Board seek to overrule the Second Circuit and the decision of this court. The four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer

there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo' clause." The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective pact is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established. The fifth member, Mr. Rodgers, emphatically refused to adopt the reasoning or conclusions of the other four, holding that such clauses are void as against public policy. Only because of his belief that such clauses are void did Mr. Rodgers join the two members who held the union incapable of enforcing the contract through employee participation. He expressly rejected their reasoning.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union, party to such agreement, is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting employer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute.

It is unquestionably the employees for whom the contract is reached. In the collective action which culminates into a contract under which the employee accepts employment and the terms by which the employer agrees to employ, where that collective contract speaks of the relationship, employer and employee are contractually defined. We urge that there is no difference in entering into an agreement that employees will not be required to work on non-union goods than there is that the employees will not be required to work under unsafe conditions, or that the employees will not be permitted to use certain types or makes of tools, either for reasons of safety or productivity. Such restrictive provisions are common in labor contracts. These provisions can and do result in "boycotting" the makers of those tools and cause the employer to refrain from dealing with those makers. Yet, it is not contended, and we doubt it will be, that such restrictive covenants amount to a secondary boycott. The point is that all of these are conditions of work. All of these matters are

reasonably necessary for the peaceful relations of the employer and his employees and the enhancement of the productive effort. There is no difference between a requirement that the employer will not require productive efforts on non-union materials than that the employer will be required to pay wages or confer other working benefits to his employees. We suggest there is nothing improper in the insistence by a union that a contracting employer obey the restrictions concerning the types and makes of tools, although that may, and has, resulted in not using those articles, or that the employer pay wages or perform other provisions of the collective action even though it may result in some supplier being unable to inject his offensive articles into the employment relation. Neither is there an impropriety in a union insisting in the obedience of any of the provisions of its collective contract.

The correctness of these conclusions is emphasized by still another provision of the collective contract. As we have previously stated, the employer has agreed that he would not, by contract or otherwise, put himself in a position where he violates any of the terms of the collective bargain. Haystad and Jensen, by this provision, *had a duty to determine prior to the delivery of the doors that such were union made*, or at least the doors and *the contract which they executed for obtaining the doors was in conformity to the promises and agreement of Haystad and Jensen not to take any action which would put them in a position to violate the contract's provisions.* To hold that a union, charged with the representation of employees, could not compel the contracting employer to obey [illegible] contract is foreign to any legal concept.

The plain fact is that a union would have been derelict in its duty to the persons it represents not to have com-

pletely informed its membership as to every clause in its collective agreement.

When Fleisher appealed to Steinert to stop the hanging of the doors, he was, manifestly, appealing to management to obey the contractual provisions. The fact that the working rules of Respondent Council and the restrictive provision of the contract were almost identical in terms with respect to work on non-union goods does not alter the proper conclusion that the union was not acting contrary to the statute when Fleisher made his appeal to Steinert. The Board argues that Fleisher did not mention the contract provisions when he spoke to Steinert, and that appears to be a fact. But the fact is also clear that he did not mention the working rules either. Persuasive authority has held that working rules standing alone do not amount to statutory violations. (*Joliet Contractors Ass'n v. N.L.R.B., supra.*) That court held that the rule *may* furnish the inducement or encouragement for a strike or concerted refusal to perform services, but at least, until they have been shown by evidence to have done so, they are not contaminated with illegality. In this case, there is no evidence that the working rules were the motivating factor which resulted in the difficulty concerning the doors. A contrary conclusion without evidentiary support is a nullity.

We are not unmindful that in the struggle for existence, competition for markets becomes keen. We do know, however, of no rule which permits such competition to succeed by the inducement of violations of contracts of others in the competitive market. We suggest that the injection of Paine and Sand into a market for which they are not qualified is not afforded protection by the provisions of this statute. They must accept the mar-

ket as they find it and cannot complain because it has previously been contractually limited. This is especially true here where Haystad and Jensen have not only agreed not to require their employees to work on non-union materials, but where they have further agreed that they will not "by contract, or any means whatsoever, take any action that will prevent, or impede (them) in the full and complete performance of each and every term and condition" of the collective bargaining contract.

The Board argues, with some petulance, that 8(b)(4) was intended to protect neutral employers because they are embroiled in a dispute not their own. But, manifestly, when an employer or person seeks to inject their products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, but are the prime motivation of the industrial dispute. By their actions, they seek and intend to promote breaches of collective compacts and to disrupt the tranquillity of previously stabilized industrial relations.

In dealing with the subject of 8(b)(4), the court below in the *Sound Shingle* case, quoted from the statements of Senator Taft, 93 Cong. Rec. 4198, in 2 Leg. Hist. L. M. R. A. 1107. A part of that quotation reads, *"If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike."* What could be more unsatisfactory conditions than where an employer and a union have agreed by contract not to require the workmen covered to handle non-union materials and then have that employer induced by a party foreign to the contract, to breach his agreement and to require his employees to handle non-union materials. In other words, Haystad and Jensen agreed to remove from the conditions of work

any requirement that their employees handle non-union materials. This was a working condition. In violation of the express provisions of their contract they unilaterally sought to require the handling of non-union materials until the union invoked its contract. Most certainly this sets up a situation visualized by Senator Taft, and one which the Senator stated that *"it is perfectly lawful to encourage them to strike."* This argument becomes more compelling when it is considered that Sand and Paine, through Sand, attempted to disrupt the lawful contractual relations between Haystad and Jensen and the union by the injection of their non-union materials. It is most difficult to conceive that in taking this action Sand and Paine could remain aloof from the inevitable results of their generating a labor dispute and still be termed neutrals.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the Board's order denied enforcement.

Respectfully submitted.

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APPENDIX.

Section 13 of the National Labor Relations Act, as amended, reads as follows:

> "Nothing in this Act, except as specifically provided herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."